Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

CARLA SANCHEZ-AYALA and
JAMES CASTRO,

Petitioners

v.

U. S. ATTORNEY GENERAL

Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeal for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the 11th Circuit Court of Appeals abused its discretion in denying the Petition for Review of the Motion to Reopen where Petitioners have demonstrated changed country conditions and that they have a prima facie case for political asylum and Withholding Removal under the statute and the Convention Against Torture.

CORPORATE DISCLOSURE STATEMENT

No parties are corporations. Sup. Ct. R. 29.6

TABLE OF CONTENTS

Question Presented for Review.....i

Corporate Disclosure Statement.....ii

Table of Contents.....ii

Table of Authorities.....iii

Petition for a Writ of Certiorari.....1

Opinions Below.....1

Jurisdiction.....1

Constitutional Provision and Statutes Involved.....1

Statement of the Case.....2

Reason for Granting the Writ.....2

I. The Decision Below Conflicts with Established Case Law.....2

i. Country Conditions.....4

ii. Petitioners' Prima Facie Case for Political Asylum.....5

a. Political Asylum.....5

1. Credibility.....6

b. Withholding of Removal Under the Statute.....10

1. Clear Probability of and No Safety In Moving.....11

A. Clear Probability of Persecution.....11

B. No Safety In Moving.....11

c. Withholding of Removal Under the Convention Against Torture.....13

2. Torture by the FARC with the Acquiescence of the Columbian Government.....14

Conclusion.....14

Appendix.....1a

TABLE OF AUTHORITIES

CASES

Adriano v. INS, 168 F.3d 497 (9th Cir. 1999).....8, 11

Arteaga v. INS, 836 F.2d 1227, 1231 & 1232 (9th Cir. 1988).....6

Cordon-Garcia v. INS, 204 F. 3d 985, 990 (9th Cir, 2000).....5, 6

Duarte de Guinac v. INS, 179 F.3d 1156, 1159 (9th Cir. 1999).....6, 10

Eftekhary v. Ashcroft, 77 Fed. Appx. 980 (9th Cir. 2003).....3

Gonzalez v. INS, 82 F.3d 903, 907 (9th Cir. 1996).....8

INS v. Abudu, 485 U.S. 94, 104-105 (1988).....2, 3

INS v. Dougherty, 502 U.S. 314, 323, 112 S.Ct. 719 (1992).....2

INS v. Elias-Zacarias, 502 U.S. 478, 481, 112 S.Ct. 812 (1992).....5

In re: Y-L, A-G, R-S-R, 23 I.&N. Dec. 270, 283 (BIA 2002).....14

Kataria v. INS, 232 F.3d 1107, 1119 (9th Cir. 2000).....5, 6, 10, 11

Ladha v. INS, 215 F.3d 889, 897 (9th Cir. 2000).....6

Leiva v. Morales, 165 F.3d 916 (9th Cir. 1998).....5

Li v. INS, 92 F.3d 985, 988 (9th Cir. 1996).....3

Lim v. INS, 224 F.3d 929, 935 (9th Cir. 2000).....7

Matter of A-S-, 21, I&N Dec. 1106 (BIA 1998).....7, 10

Matter of C-A-L-, 21 I&N Dec. 754 (BIA 1997).....7

Matter of E-P, 21 I&N Dec. 860 (BIA 1997).....10

Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).....7

Matter of S-V, 22 I.&N. Dec. 1306 (BIA 2000).....13

Mejia-Paz v. INS, 111 F.3d 720, 723 (9th Cir. 1997).....6

Navas v. INS, 217 F.3d 646, 655 (9th Cir. 2000).....10

Ontunez-Tursios v. Ashcroft, 303 F.3d 341
(5th Cir. 2002).....14

Reyes-Guerrero v. INS, 192 F.3d 1241, 1243-44
(9th Cir, 1999).....8, 9. 10, 11

Sanchez-Ayala v. U.S. Attorney General, Slip Copy,
2007 WL 177599 (C.A. 11).....1

Singh v. INS, 134 F.3d 962, 967 (9th Cir. 1998).....6

Watkins v. INS, 63 F.3d 844, 847 (9th Cir. 1995).....4

Zayas-Marini v. Immigration and Naturalization
Service, 785 F.2d 801 (9th Cir. 1986.....7

Zheng v. Ashcroft, 332 F.3d 1186, 1195
(9th Cir. 2003).....13

STATUTES

Section 101(a)(15) of the Immigration
And Nationality Act.....1, App. 1a
Section 208(a) of the Immigration
and Nationality Act.....1, 14, App. 2a
Section 237(a)(1)(B) of the Immigration
And Nationality Act.....1, App. 3a

Section 241(b)(3) of the Immigration and Nationality Act.....1, 14, App. 4a

8 C.F.R. § 3.2(c)(3)(ii).....3

8 C.F.R. § 208.13(b)(1)(i) (2000).....1, 6, App. 5a

8 C.F.R. § 208.16(c)(2).....1, 13, 15, App. 7a

8 U.S.C. § 1003.2(c).....2, 5, App. 40a

8 U.S.C. § 1158(a).....14

8 U.S.C. § 1231 (b)(3) (Supp. II 1996).....2, 15, App. 7a

28 U.S.C. § 1254(1).....1

OTHER SOURCES

Country Reports on Human Rights Practices - Columbia (2001)..... 4, 5

Country Reports on Human Rights Practices - Columbia (2005).....4, 5

Country Reports on Human Rights Practices - Columbia (2006).....4, 5

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Carla Ines Sanchez-Ayala and James Castro, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeal for the 11th Circuit.

OPINIONS BELOW

The opinion of the Court of Appeal, Sanchez-Ayala v. U.S. Attorney General, Slip Copy, 2007 WL 177599 (11th Cir. 2007) (App. 36a) is not published. The opinion of the Board of Immigration Appeals dated June 5, 2006 regarding their denial of Petitioners' Motion To Reopen (App. 31a) is not reported. The opinion of the Board of Immigration Appeals dated February 7, 2006 (App. 29a) is not reported. The Opinion of the Immigration Judge (App. 10a) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the 11th Circuit was issued on January 22, 2007. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Section 101(a)(15) of the Immigration and National Act: (App. 1a)
Section 208(a) of the Immigration and Nationality Act: (App. 2a)
Section 237(a)(1)(B) of the Immigration and Nationality Act: (App. 3a)
Section 241(b)(3) of the Immigration and Nationality Act: (App. 4a)
8 C.F.R. § 208.13(b)(1)(i) (2000) (App. 5a)
8 C.F.R. § 208.16(c)(2) (App.6a)

8 C.F.R. § 208.16(c)(2) (App.6a)
8 C.F.R. § 1003.2(c)
8 U.S.C. § 1231 (b)(3) (Supp. II 1996) (App. 6a)

STATEMENT OF THE CASE

Petitioners timely filed their asylum application. At the conclusion of the Individual Hearing on September 14, 2004, the Immigration Judge denied Petitioners' applications for political asylum and withholding of removal under the statute and the United Nations Convention Against Torture.

Petitioners then appealed the Immigration Judge's decision to the BIA. On February 7, 2006, the BIA affirmed the Immigration Judge's decision and gave additional comments. Petitioners then filed a motion to reopen that decision but on June 5, 2006, the BIA denied their motion to reopen. Petitioners filed their Motion To Grant Stay of Removal with the 11th Circuit Court of Appeals. The 11th Circuit Court of Appeals denied their motion. Petitioners filed a Motion To Stay Removal with the United States Supreme Court. The Supreme Court denied that motion on August 28, 2006. Petitioners filed their Petition for Review of the BIA's decision denying their motion to reopen the case. That Petition for Review was denied on January 22, 2007.

REASON FOR GRANTING THE WRIT

The Decision Below Conflicts with Established Case Law

The Court of Appeals abused its discretion in denying Petitioners' Motion to Reopen. See I.N.S. v. Doherty, 502 U.S. 314, 315, 112 S.Ct. 719 U.S., 1992, citing INS v. Abudu, 485 U.S. 94, 105, 108 S.Ct. 904, 99 L.Ed.2d 90, (1988).

In Eftekhary v. Ashcroft, 77 Fed. Appx. 979, 980 (9th Cir. 2003), the Court stated:

> The Board did not abuse its discretion by determining that Eftekhary's motion did not furnish new evidence of changed country conditions sufficient to satisfy 8 C.F.R. §3.2(c)(3)(ii). Under section 3.2(c) (now 8 C.F.R. § 1003.2), new evidence of changed country conditions only justifies reopening deportation proceedings if Eftekhary can establish a prima facie case for asylum. INS v. Abudu, 485 U.S. 94, 104-05, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988). Fear of criminal prosecution does not constitute a prima facie case for asylum unless the record shows that prosecution will likely result in "disproportionately severe punishment." Li v. INS, 92 F.3d 985, 988 (9th Cir.1996).
>
> Eftekhary submits as new evidence the 2001 State Department Country Report for Human Rights Practices for Iran (Country Report), available at http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8251.htm, and an Iranian newspaper article. The Country Report does not support a prima facie case for asylum and withholding of deportation because it merely indicates that Iranian citizens returning from abroad are "subject to search and extensive questioning by government authorities for evidence of regime activities abroad." *Id.* Government officials may search and question returning nationals without committing politically motivated

"persecution" for purposes of the Immigration and Nationalization Act.

Eftekhary's newspaper article reports that Iranian authorities executed an Iranian national after he confessed that he "returned to Iran ... under thedirection of the CIA to commit treason and espionage." *Siavash Bayani Is Executed for Spying for America,* SALAAM NEWSPAPER, Sept. 2, 1997. This text does not compel the conclusion that Iranian authorities would bring espionage charges or impose capital punishment simply because Eftekhary deserted the military, departed the country illegally, and spent considerable time abroad. Eftekhary's new evidence does not demonstrate that the Board's decision to deny his motion was "arbitrary, irrational, or contrary to law." Watkins v. INS, 63 F.3d 844, 847 (9th Cir.1995).

i. Country Conditions

The Court of Appeals for the 11th Circuit states that the March 27, 2006 letter from the local president of the Liberal Party only made references to general threats to members of the Liberal Party. However, the Columbian government has been unable and unwilling to control the activities of the FARC guerillas. The U.S. Department of State's Country Reports for Human Rights Practices for Columbia for 2001 is replete with information of the lawlessness of the guerillas. The 2005 and 2006 Country Reports evidence the failure of the Columbian government to

fully control such lawlessness to date.[1] The 2006 Country Report shows the activities of the FARC has increased since the 2005 report was issued. For example, forced disappearances and the unlawful killings of teachers, human rights activists and religious teachers increased 2005 and 2006. The Liberal Party's letter together with The Country Reports are sufficient to satisfy a reopening pursuant to 8 C.F.R. § 1003.2(c).

Since the Petitioners show, infra, that they have a prima facie case for political asylum, their case should be reopened.

ii. Petitioners' Prima Facie Case for Political Asylum

a. Political Asylum

To establish eligibility for asylum, an applicant must prove that he or she is a refugee. Kataria v. INS, 232 F.3d 1107, 1119 (9th Cir. 2000), Citing Cordon-Garcia v. INS, 204 F. 3d 985, 990 (9th Cir, 2000). An asylum applicant must demonstrate "persecution or a well-founded fear of persecution on account of [one of five grounds]: race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §1101(a)(42(A). The asylum applicant bears the burden of establishing past persecution and a well-founded fear of future persecution based upon one of the five protected grounds of the Act. INS v. Elias-Zacarias, 502 U.S. 478,481, 112 S. Ct. 812 (1992).

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[1] We ask the Court to take judicial notice of the two most current Country Reports on Human Rights Practices for Columbia for 2005 and 2006, located at http://www.state.gov/g/drl/rls/hrrpt/2006/78885.htm and http:www.state.gov/g/drl/rls/hrrpt/2005/78885.htm pursuant to Lising v. INS, 124 F.3d 996 (9th Cir. 1997) since they go to the heart of this case. See also Gafoor v. INS, 231 F.3d 645 (9th Cir. 2000).

Persecution is defined as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive." Kataria 232 F.3d at 1119, citing Cordon-Garcia, 204 F. 3d at 991 (quoting Singh v. INS, 134 F.3d 962, 967 (9th Cir. 1998). Threats can rise to the level of persecution. Leiva Morales v. I.N.S., 165 F.3d 916 (9th Cir. 1998), citing Arteaga v. INS, 836 F.2d 1227, 1231 & 1232 (9th Cir.1988).

To establish a well-founded fear of persecution, an applicant must demonstrate both a subjective and an objective fear of persecution. Kataria, 232 F.3d at 1119, citing Mejia-Paz v. INS, 111 F.3d 720, 723 (9th Cir. 1997). An applicant can satisfy the subjective component by credibly testifying that he genuinely fears persecution. An applicant can satisfy the objective component in two ways. Kataria, 232 F.3d at 1119, citing Ladha v. INS, 215 F.3d 889, 897 (9th Cir. 2000). The first way is to prove persecution in the past, giving rise to a rebuttable presumption of a well-founded fear of future persecution. Citing 8 C.F.R. § 208.13(b)(1)(i) (2000). The second way is to "show a good reason to fear future persecution by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution." Kataria, 232 F.3d at 1119, citing Ladha, 215 F. 3d at 897 (quoting Duarte de Guinac, 179 F.3d 1156, 1159 (9th Cir. 1999). The objective requirement can be met "either through the production of specific documentary evidence or by credible and persuasive testimony. Id.

1. Credibility

The Immigration Judge found that Lead Petitioner was not credible and the BIA affirmed that decision stating that the Petitioners failed to present a credible claim for relief and made additional comments as to credibility. The

BIA stated that the Petitioners' story was implausible and inconsistent and cited Matter of A-S-, 21, I&N Dec. 1106 (BIA 1998). It went on to state that the Petitioners failed to provide testimony that was believeable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for their fear and cited Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). The Board said that the Lead Petitioner asserted that her life was threatened by the FARC, and that she was able to flee to the United States, but returned to Columbia to care for her sick mother. According to the Board, the Lead Petitioner stated that after her mother healed, she decided to continue her work with the Liberal Party, providing literacy programs to farmers, knowing that she would be returning to the zone of danger. The BIA stated that the Lead Petitioner testified that on many occasions while meeting with farmers, she was surprised by the FARC, and barely escaped by literally running out the back door, as the FARC entered the front door. The BIA then said, it noted that Lead Petitioner was able to live unmolested in Columbia while she cared for her mother and cited Matter of C-A-L-, 21 I&N Dec. 754 (BIA 1997).

In Zayas-Marini v. Immigration and Naturalization Service, 785 F.2d 801 (9th Cir. 1986), Marini's return to his country more than once after fleeing in fear was not held against him. In Lim v. INS, 224 F.3d 929, 935 (9th Cir. 2000), Melencio Lim served as a police officer in the Philippines from 1972 to 1987. In 1985, he testified in open court against some subversive leaders, including Mario Subona. (Lim, 224 F.3d at 932). Shortly thereafter, he appeared on the NPA death list and began receiving death threats. In 1987, to escape the threats, Lim left the police department began practicing law in the Philippines. (Lim, 224 F.3d at 933). From 1990-91, three of Lim's former colleagues in the Subpoena investigation were murdered one-by-one. Although neither Lim nor his family were ever

confronted or attacked, in May of 1991. Lim began to notice that he was being followed by unidentified men. In August of 1991, Lim left his wife and four children in the Philippines and fled to the United States. (Lim, 224 F.3d at 933).

The Lim Court held that Lim's failure to leave the Philippines for *six years* after the first death threat does not render his fear unreasonable. The Court stated that although relevant, a post-threat harmless period need not vanquish an asylum claim, particularly where significant evidence suggests that the threats are becoming more menacing. Citing Cf. Reyes-Guerrero v. INS, 192 F.3d 1241, 1243-44 (9th Cir, 1999) (granting asylum to petitioner who endured death threats for seven years prior to fleeing).

Similarly, In Adriano v. INS, 168 F.3d 497 (9th Cir. 1999), Carmencita Padilla Adriana, a native and citizen of the Philippines, and like the petitioner in Gonzalez v. INS, 82 F.3d 903, 907 (9th Cir. 1996), had lived in her region for many years and received escalating threats, which finally drove her to flee, and leave behind her country and family. Adriano testified that she took the third death threat by the NPA extremely seriously, unlike the two earlier threats, because NPA members told her that this was her final warning to discontinue her religious ministry and that her name had been placed on a NPA hit list. It was soon after this "final" threat that she left the country. The Adriano Court reversed the BIA's decision and granted Adriano political asylum.

In 1984, Carlos and Judge Guillermo Cruz-Cruz began getting death threats, warning them against pursuing the investigation. Twice in 1989, Carlos was approached and offered suitcases full of cash as a bribe to drop the case. He requested and was provided protection by the national security agency. Reyes-Guerrero v. I.N.S., 192 at 1243.

After the White Collar defendants were found guilty in 1989, and until he fled Columbia in 1991, Carlos continued to receive threats over the phone and in person. The individuals involved told Carlos that he was not going to get away with the damage he caused the Liberal Party. Carlos was told that he was responsible for the convictions and that he was a stooge for the Conservative Party. Reyes-Guerrero v. I.N.S., 192 F.3d at 1244. He was warned against playing politics, and told that he would be in trouble if the convictions were affirmed on appeal. Although he changed vehicles, residences, offices, and phone numbers, and although he had asked for protection from the government, those perpetrating the threats always managed to find petitioners. Afraid for their lives, Graciela and Carlos came to the United States in September, 1990 and June, 1991 respectively. Reyes-Guerrero v. I.N.S., 192 F.3d at 1244.

The Immigration Judge stated the article (regarding the death of Lead Petitioner's boss) indicates that he was killed but it is not known the motivation for the crime or the type of cases Mr. Rubianes Herrera was handling. The IJ further states that Lead Petitioner seeks to connect the death of Mr. Rubianes to the activities being done by the foundation in those areas but the article does not lead one to that conclusion.

However, the Court in Reyes-Guerrero, 192 F.3d at 1245 stated:

> The BIA erred when it reduced the actions against Carlos Reyes to nothing more than attempts by criminal defendants to disrupt the criminal process. The BIA's mistake was to focus on one motive of the persecutors-which was to disrupt the investigation of the White Collar Scandal-while ignoring substantial evidence in the record that the

> persecutors saw Carlos as their political enemy. The criminal justice and political systems in Columbia are closely intertwined.

As in the Reyes-Guerrero case, the possibility of mixed motives exists here in the killing of Mr. Rubianes. While he may have defended M-19 and guerillas in the past, he was actively working for the foundation at the time he was killed.

The Court should find Petitioners credible since there are no significant discrepancies and omissions and Petitioners have offered convincing explanations to the Immigration Judge's queries. See Matter of A-S-, 21 I. & N. Dec. 1106 (BIA 1998). A finding of credible testimony is essential, Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998), but it is not necessarily dispositive; the specific content of the testimony, and any other relevant evidence in the record, is also considered. Matter of E-P, 21 I&N Dec. 860 (BIA 1997).

b. Withholding of Removal under the Statute

An alien is entitled to withholding of removal "if the evidence demonstrates a clear probability that the applicant would be persecuted were he to be deported to his home country." Kataria, 232 F.3d at 1120, citing Duarte de Guinac, 179 F.3d at 1159. "In order to demonstrate a clear probability of persecution, a petitioner must prove that "it is more likely than not that he would be persecuted on account of a statutorily-protected ground." Kataria, 232 F.3d at 1120, Citing Navas v. INS, 217 F.3d 646, 655 (9th Cir. 2000). An alien seeking withholding of removal to any country must show that his life or freedom would be threatened in that country on account of one of the enumerated grounds.

Kataria, 232 F.3d at 1120, Citing 8 U.S.C. § 1231 (b)(3) (Supp. II 1996).

1. Clear Probability of Persecution and No Safety in Moving

A. Clear Probability of Persecution

According to Kataria, 232 F.3d at 1127-28, citing 8 C.F.R. 208.16(b)(2) (2000); Navas, 217 F.3d at 657 ("A showing of past persecution gives rise to a presumption that the applicant has shown a clear probability of future persecution so as to entitle him to withholding of deportation"), if the applicant is determined to have suffered persecution in the past such that his or her life or freedom was threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that his or her life or freedom would be threatened on return to that country unless a preponderance of the evidence establishes that conditions in the country have changed to such an extent that it is no longer more likely than not that the applicant would be so persecuted there.

Adriano and Reyes-Guerrero, discussed supra, were granted withholding of removal. Like the Petitioners in Adriano and Reyes-Guerrero, the Petitioners here warrant a grant of withholding of removal because they suffered past persecution and there exists a clear probability that they will suffer future persecution were they to be returned to Columbia.

B. No Safety in Moving

An individualized analysis would show that Petitioners could not safely move to another part of Colombia. Ms. Sanchez testified that she worked for a

foundation where she trained peasants/farmers in the rural areas of Miranda, Corinto, and Caloto. Ms. Sanchez testified that she campaigned with the Liberal Party and also told the farmers in her literacy program about the Liberal Party. And at the foundation, besides teaching the farmers, she would help them to obtain their property title, through the Regional Columbia Institute of Agriculture, so that they could own their land and the FARC guerillas could not get them out of their land.

Ms. Sanchez testified that she had problems in Columbia. Ms. Sanchez stated that they (the guerillas) were calling her house in 1998, January 23, 1998 and she reported those calls to the police. She returned home from visiting the U.S. in May 1998 and she received calls after returning home but the maid would answer and say that Ms. Sanchez was not home.

Ms. Sanchez also testified of two times that the FARC almost got to her in person. The first time was on February 1, 2001. She was in a store in Miranda. A farmer that was a student of hers told her that it was better if she left because the FARC was looking for her. So, she left. She took her car and went home to Cali. On February 9, 2001, she went to the school in Miranda. She was in the classroom when a female farmer, Carmen, came in and told her that the FARC was getting close. Ms. Sanchez stated that she looked through the window and she saw about 15 people from the 6th Front of the FARC. She knew they were from the FARC because they were wearing camouflage attire and had rifles. Ms. Sanchez stated that she escaped through another door and she immediately went down a hill and asked for help from a jeep. She was then taken to her home in Cali. The next morning, she received a call from the 6th Front of the FARC at her house. They said to her "we are warning you, this is an ultimatum we're giving you teacher. We're looking for you. Whenever we find you, you know what's

going to happen to you." After that, Ms. Sanchez left to hide at a relative's house in Cali while preparing to come to the U.S. She came to the U.S. on April 10, 2001 and has not returned to Columbia since then.

The Lead Petitioner testified that if she were to go to Columbia, she would be killed because the 6th Front of the FARC is located all over Columbia. She further testified that the proof of that happening to her is that Dr. Jesus Rubianes, her former boss at the foundation, was killed by the 6th Front of the FARC on June 5, 2003, right in front of some farmers. She stated that they are looking for her to kill her.

Under current country conditions the Petitioners would not be safe were they to be returned to Columbia.

c. Withholding of Removal Under the Convention Against Torture

Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits it signatory states from removing "a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture." The United States is a signatory to the Convention and therefore, pursuant to 8 C.F.R. 208.16(c)(2), an applicant for relief under the Convention against Torture may not be removed to the stated country if the applicant can establish that it is more likely than not that he would be tortured if he were to be removed to that country.

In Zheng v. Ashcroft, 332 F.3d 1186, 1195 (9th Cir. 2003), the Court disapproved of the Board of Immigration Appeals' (BIA) decision in Matter of S-V, 22 I.&N. Dec. 1306 (BIA 2000). In Matter of S-V, the BIA en banc denied relief under the Convention Against Torture to a Appellant who asserted that if he were removed to Columbia, he would

be tortured by non-governmental guerillas, narco-trafficking and paramilitary groups. The Court went on to state at page 1196 that under a narrowed interpretation of acquiescence, the BIA stated that "the relevant inquiry under the Convention Against Torture ...is whether governmental authorities would...'willfully accept' atrocities committed against persons in the persons position." Quoting In re: Y-L, A-G, R-S-R, 23 I.&N. Dec. 270, 283 (BIA 2002). The correct inquiry, said the Court, as intended by the Senate, is whether a Appellant can show that public officials "would turn a blind eye to torture." Quoting Ontunez-Tursios v. Ashcroft, 303 F.3d 341 (5th Cir. 2002).

2. Torture by the FARC with the Acquiescence of the Columbian Government

The Immigration Judge stated that the Petitioners have not shown that it is more likely than not that they would be tortured if returned to Columbia.

In the case at Bar, the Columbian government has turned a blind eye to the activities of the FARC where the guerillas act with impunity. Since Petitioners face torture at the hands of the FARC with the acquiescence of the Columbian Government, they should be granted withholding of removal under the Convention Against Torture.

CONCLUSION

For all of these reasons, Petitioners respectfully request that the Court of Appeals for the 11th Circuit's decision be reversed and that their Motion to Reopen their case for Political Asylum, Withholding of Removal under the Statue and Withholding of Removal under Article 3 of the Convention Against Torture pursuant to 208(a). 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C.

§§ 1158(a), 1231 (b)(3), and 8 C.F.R. § 208.16(c)(2) be granted.

Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Section 101(a)(15) of the Immigration and Nationality Act:

(a) As used in this Act:

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens

(A) (i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

(ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above[.]

Section 208(a) of the Immigration and Nationality Act:

Authority to Apply for Asylum. –

(1) In general. - Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

(2) Exceptions. –

(A) Safe third country. - Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of alien's arrival in the United States.

(C) Previous asylum applications. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed conditions. - An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the period specified in subparagraph (B).

(3) Limitation on judicial review. No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

Section 237(a)(1)(B) of the Immigration and Nationality Act:

(a) Classes of Deportable Aliens.-Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status.

(B) Present in violation of law.- Any alien who is present in the United States in violation of this Act or any other law of the United States, or whose nonimmigrant visa

(or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(i) is deportable.

Section 241(b)(3) of the Immigration and Nationality Act:

(b) Countries to Which Aliens May Be Removed.-

(3) Restriction on removal to a country where alien's life or freedom would be threatened.-

(A) In general .- Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception.-Subparagraph (A) does not apply to an alien deportable under section 237(a)(4)(D) or if the Attorney General decides that-

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 237(a)(4)(B) shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

8 C.F.R. § 208.13(b)(1)(i) (2000)

(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

(1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

8 C.F.R. Section 208.16(c)(2):

(c) Eligibility for withholding of removal under the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

8 U.S.C. § 1231 (b)(3) (Supp. II 1996)

Countries to which aliens may be removed

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general
Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception
Subparagraph (A) does not apply to an alien deportable under section 1227 (a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not

preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227 (a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Miami, Florida

Files A 95 264 423 **September 14, 2004**
A 95 264 424

In the Matters of

CLARA INES SANCHEZ-AYALA,	)	IN REMOVAL
	)	PROCEEDIN
JAMES CASTRO,	)	
	)	
Respondents	)	

CHARGE:

APPLICATIONS:

ON BEHALF OF RESPONDENTS:	ON BEHALF DEPARTMENT OF HOMELAND SECURITY:
Juan Saborio, Esquire	Lisa Schultz, Esquire

DECISION OF THE IMMIGRATION JUDGE

Each of the respondents where issued Notices to Appear and they are in their respective records of proceedings as Exhibit 1. The Government indicates that James Castro is not a citizen of national of the United States

but a native and citizen of Colombia who was admitted at Miami, Florida, July 5, 1998, as a visitor for pleasure and who remained beyond the 4th of August, 1998, without authorization from the Immigration and Naturalization Service. The respondent has, through counsel, admitted to the allegations and conceded to his removability as charged in his Notice to Appear. Based on admissions andconcession, the Court finds that James Castro is removable under Section 237(a) (1) (B) of the Immigration and Nationality Act.

Although James Castro claimed that he was being persecuted by the revolutionary armed forces of Colombia while he was there, he never filed an asylum application on his own behalf. He claimed that he was waiting for his spouse to come to the United States before he filed asylum. His wife did not return to the United States until 3 years later.

Clara Ines Sanchez-Ayala has her Notice to Appear marked as Exhibit 1 and the Government alleges that she's not a citizen or national of the United States but a native and citizen of Colombia who was admitted to the United States at Orlando, Florida, April 10, 2001, as a visitor for pleasure. The Government states that she remained beyond October 9, 2001, without authorization from the Immigration and Naturalization Service.

The respondent has, through counsel, admitted to those allegations and conceded to removability as charged in her Notice to Appear. Based on the admissions and concessions, the Court finds that Clara Ines Sanchez-Ayala is also removable under Section 237(a) (1) (B) of the Immigration and Nationality Act.

Clara Ines Sanchez-Ayala will also be referred to by the Court as Clara She did tender an asylum application to the Government on April 8, 2001, just a couple days shy of her one year presence in the United States. The Reports on Human Practices for Columbia dated March 4, 2002, are in the record of proceedings of Clara as Exhibit 3.

Counsel for the respondents tendered additional materials consisting of a medical report relating to Clara and it's in her record of proceedings as Exhibit 4. On the 18th of July, 2003, counsel for th respondents tendered a newspaper article from the Internet and letters and they're all composite Exhibit 5. The Court only has what is purported to be a letter from the Revolutionary Armed Forces of Colombia and the letter's purportedly dated June 5, 2003. The respondents' counsel on September 5, 2003, tendered another newspaper article along with a letter indicating that the foundation had as it's director and representative a Doctor Rubianes who had been killed. And there's a translation of a death certificate and it's all composite Exhibit 6. On the 8th of September, 2004, the respondent tendered an addendum to her asylum application as well as proof of the existence of a non profit organization and it's all composite Exhibit 7. Both of the respondents have testified and there are no other witnesses nor documents for consideration by the Court.

CLAIMS FOR ASYLUM, WITHHOLDING OF REMOVAL AND TREATMENT UNDER THE CONVENTION AGAINST TORTURE

Asylum may be granted to an individual under Section 208 of the Act if the person qualifies as a refugee within the meaning of Section 101(a) (42) of the Act which defines that term to include any person who is outside any country of such person's nationality and who is unable or unwilling to return to, and is unable or unwilling to avail himself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or a political opinion.

The asylum request is also viewed as an application for withholding of removal under Section 241(b) (3) of the Act which places restrictions on the removal of an

alien to a country where the alien's life or freedom would be threatened; an alien may not be removed to a country if th Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or a political opinion. Section 241(b} (3) of the Act would require that the respondent demonstrate a clear probability of persecution on account of one of the five grounds enumerated in the Act; the clear probability standard requires a showing that it's more likely then not that the respondent would be subject to persecution. See INS v.Stevic, 467 U.S. 407 (1984).

The Court also examined if either of these respondents might be eiigible for treatment under the Convention Against Torture and to qualify they must prove that he or she will be tortured if he or she returns to Colombia and that the act will be instigated by or with the acquiescence of the public official or other person acting in an official capacity. The respondents must prove it's more likely then not that he or she would be tortured if returned to Colombia.

ANALYSIS AND CONCLUSION

With reference to the respondent James Castro, he entered the United States .in July 1998. He stated that he was fleeing persecution but he never filed an asylum application. On his own, he is not entitled to asylum in as much as he did not file his asylum within one-year. 8 C.F.R. 208.4 indicates that the individual has the burden of proving by clear and convincing evidence that he filed for asylum within one-year of arriving or that they qualify for .an exception to the one-year deadline.

In this case, James Castro indicated that he came to the United States fleeing persecution but did not file for asylum as he was waiting for his wife to join him. His

wife did not come to the United States until almost 3 years after James Castro left Colombia. Indeed, with the one-year deadline staring him in the face he should have filed and he did not do so. The Court would find that on his own he is not entitled to asylum.

James Castro is, thru included in the asylum application filed by his spouse, Clara Ines Sanchez-Ayala. She tendered her asylum application to the Government on April 8, 2002, almost one-year after her entry into the United States. Within the asylum application in answering Part C, Question 1, Clara states that she started working with a foundation in January 1996 developing education and labor training programs, well as, social and community organization program in three different municipalities in the department of Cauca. She also states that she was active member of the Colombia Liberal Part in Corinto from 1996 to 2001 developing social and political services in the community.

She relates that the 6th Front of the Revolutionary Armed Forces of Colombia was in disagreement with the way that Clara was conducting her work. She asserts that she was told to "leave the area or else" and that her superiors advised her to get out of there. She continues that after that she got married and 9 days later came the United States at the invitation of a friend. Although she planned to remain in the United States 60 days she said she changed her plans because of her mother's illness and returned to Colombia 20 days earlier then planned.

Clara explains that while she was in the United States her husband started having problems with the FARC guerrillas because of the work he was doing in the same areas where Clara had been working. Two months after Clara returned to Colombia the husband came to the United States because of "messages" received from the FARC.

Clara claimed that she would come with her husband but she decided to stay to assist her ill mother with

whom Clara was living and she indicates that she was the only daughter there in Colombia. Clara claimed that when her mother got better from her illness she decided to return to work in the year 2002 doing the same type of work as she did prior to her travel to the United States.

She relates that in February of 2001 FARC started threatening her and that on two occasions she had to escape from FARC search squads because she was declared a military objective. She states that it added to a deterioration of her mental health because of her stress and that her superiors and her brothers suggested that she abandon Colombia fearing that the harm would harm her badly or kidnap her. Clara gave this information in answering Part C, Question 1, of her asylum application. She did not attach anymore detailed information within the asylum application proper. She does include an addendum at Exhibit 7.

She indicates therein that she started receiving threatening calls in January 1998 at her residence and the calls were from the 6th Front of FARC and she was told not to go back to work. She explains that in February 15, 1998, she received another call from the FARC and again told not to return to the lands of Corinto, Miranda and Caloto.

She explains that she did come to the United States on March 29, 1998, but only remained here for a month and a half because her mother was ill.

She asserts that on August 5th, 2000, she went back to work for the foundation and that in February of 2001 she was approached by a farmer at a store and told that she was being sought out by the FARC and she should leave. She claims that she thus got in her car and left for Colombia. She continues that on February 9th, 2001, she again at a school in Miranda when a farm girl told her that the 6th Front of FARC was coming and as the respondent looked out the window she saw 15 people in uniform with weapons walking toward the school. Clara claims that she left on foot through a shortcut and got a ride to Cali in a jeep. She told her

superior who advised her not to travel there anymore. She states that on the following day she received a ultimatum from the FARC telling her not to go near that area and that she had been warned about that and had she not listened to them she would be killed. She states that she thus left the country. She claims that her boss Jesus Rubianes was killed by guerrillas and this occurred on the 5th of June, 2003.

With reference to the death of the supervisor, Mr. Rubianes, there is an article included within Exhibit 6 as to the death of Jesus Rubianes Herrera. The article indicates that Mr. Rubianes was a defender of guerrilla members. According to the news article Mr. Rubianes was among a group of 'attorneys, who in the 1980's were in the defense of individuals who were captured and accused of belonging to a guerrilla group. Mr. Rubianes mainly defended members active in the -19 guerrillas groups but he also represented members of the FARC and members of the ELN. According to the article several members of that group of defense attorneys had received death threats and abandoned but Mr. Rubianes continued his career in that area. The article indicates that he was killed but it is not known the motivation for the crime or the type of cases Mr. Rubianes Herrera was handling.

Clara seeks to connect the death of Mr. Rubianes to the activities being done by the foundation in those areas but the article does not lead one to that conclusion. Clara Ines Rubianes had an opportunity to testify on two different occasions. She started her testimony on August 24th, 2004, but the matter was reset to this 14th of September, 2004, to allow her more time to present her claim. Moreover, it was obvious after the start of the testimony by Clara that she would need more time to present her asylum claim.

Clara claimed that she was active with the Social Advancement Foundation since January 1996. She asserted that the purpose of this foundation was to help out

among the work she did was trying to partition lands for cultivation in the towns of Corinto, Miranda and Calete. She said that land was being parceled out to pheasants to live there. She explained that she did this in conjunction with a government agency which was giving lands to the pheasants.

On this 14th of September, 2004, Clara said that her first problem was in February of 2001 but in her asylum application she points out that she had previously encountered difficulties. in Colombia. She claimed that she had been receiving calls from FARC to leave or else. She indicated that she thus carne to the United States. She testified that she entered the United States on the 29th of March, 1998. She did not seek asylum when she entered the United States in March 1998. Indeed, by this time she had already been involved in the foundation and she had already been the subject of threats and she did not stay to file an asylum application. Instead, she returned to Colombia.

James Castro claimed that he had been active since the middle of 1966 in preaching in the rural areas. He claimed to have been involved in social and evangelical work in the areas on the weekends. He asserted that the guerrillas considered him a spy. He relates' that a threatening call was made to him on June 1, 1998, while he was at his mother's house. He had said that the caller identified himself as being a member of the Revolutionary Armed Forces of Colombia and he was warned not to give his back to them or he would be killed. James Castro did not receive any other calls or have any other problems. However, the comments scared him enough where he came to the United States in July 5th, 1998. By this time Clara had already returned to Colombia from her visit to the United States.

James Castro did not tell Clara, his wife, about the threatening call that he received from the FARC in 1998. He said he didn't want to worry her about that. This Court can hardly find that credible. After all, Clara had come to the United States in March 1998 in order to escape the

threats being made against by the FARC. Logic would dictate that if he was also targeted he would have informed her about that and plans would have been made for the two of them to leave. Logic would dictate that steps would have been taken by him to assure that their safety is taken care of. That he would not inform her just simply is not credible. He said that he came to the united States on July 5th, 1998, as he feared he would be killed. That he did not inform Clara stretches the outer limits of (indiscernible) when one considers that she had already purported come to the United States in March 1998 out of threats made by her previously.

Clara indicated that. she was caring for her mother and her testimony was rather confusing as to whether or-not she received any threats after she returned to Colombia to care for her mother. She indicated that she returned to Colombia because her mother was ill and stated that she returned roughly in June1998. She was asked if she had any threatening calls between April '98 and August 2000, and she indicated that it was because they had changed their residence. She was asked if she received any threatening calls after her return to Colombia in May 1998 and she claimed that calls were received but the maid answered the phone and indicated that the respondent was out of the country. She claimed that when the maid or her mother answered the phone they would deny that Clara was at home. She claimed that she stayed living at her mother's house.

Clara claimed to have returned to work with the foundation. That she would have returned to work with the foundation when she was still receiving threatening calls simply is not credible. She stated then in February of 2001 a farmer told her to leave when she had gone to Miranda to conduct her training in literacy to the farmers. Clara said that she was telling the farmers that they should not be growing the cocaine or the marijuana which the FARC was giving them. She said that the farmer told her that it would

be best if she left and she thus did leave on February 1, 2001. By this point, Clara has been warned by the farmer to leave and supposedly by this time she's receiving threatening calls at home. Logic would dictate that she would cease her activities immediately but that is her case. She claims that she again returned 9 days later and that in February 9, 2001, she had gone to a classroom and a female farmer told her to leave because the FARC was coming. She claims that she say 15 individuals in camouflage and so she ran through another door and down a hill and managed to get help in getting a ride to Cali in a jeep that was passing by. She states that her bosses told her not to return to those areas. She testified that on the 10th of February, 2001, she received a threatening call. She indicates that it was from the Revolutionary Armed Forces of Colombia and she was told that she had been warned and given an ultimatum and that when they found her she would know what would happen to her. She said that she had gone to hid at relative's house. The threatening call was received on February 10th, 2001, but she did not leave until 2 months later. She claims to be in hiding. She had a visa. She has a passport and clearly she could have left immediately but did not do so. That she would have delayed 2mqnths belies any claim of fear of harm.

The whole issue is whether or not Clara has presented a credible claim to asylum. In this case, she asserts that she had been threatened guerrillas and it was the cause of her leaving to the United States in March 1998 just 9 days after she married. She did not stay after she entered on March 1998. Instead, she returned in June 1998. That she returned belies any claim of fear of persecution in her country.

When she returned to Columbia, she claimed that she was caring for her mother and. supposedly threatening cal1s where being made to her mother's house while she was there taking care of the mother. The guerrillas

where just told that she was out of the country and nothing ever happened to Clara during that time span of a. year and a half that she was supposedly taking care of her ill mother. That she would remain in there for so without any action being taken against her again belies any claim of persecution in her country.

She claims to have returned to teaching in the same towns that had created. problems. That she would engage again in those same activities belies any claim of being persecuted in the past. She stated that on the first occasion on February 1 she was told that it would be best if she left and she did so. That she would return again on February 9, 2001, to again engage in the same activities belies any claim of fear of harm at these individuals.

She related that she had to run away on February 9th, cause FARC guerrillas where looking for her and that on the 10th of February she got a threatening call from FARC. She did not leave right away. She waited 2 months before leaving although she had a passport and a visa. And that she would have returned a second time to engage in the same activities and then remain 2 months after she got the threatening' call the next day belies any claim of fear of persecution in her home country.

The Court finds that in this case Clara has not provided credible testimony. Her actions belie any claim of persecution. The respondents here failed to show past persecution or a well-founded fear of persecution within the meaning of the Immigration and Nationality Act and failed to meet their burden of proof that anyone in Colombia is interested in either of them due to any of the five enumerated grounds necessary to a grant of asylum. See Matter of Chen, 20 I&N Dec. 16 (BIA 1989); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

The Court finds in this case that the respondent has tendered evidence of her being involved in an organization and this Court does not doubt that. The

respondent provided proof that the director of that organization was killed and the Court does not doubt that. At issue is whether or not indeed this respondent was indeed the subject of persecution at the hands of Revolutionary Armed Forces of Colombia. Her actions belie any claim of past persecution or a well-founded fear of persecution where she to return there.

The Court finds that the respondents herein failed to satisfy the lower burden of proof required for asylum, it follows they fail to satisfy the clear probability standard of eligibility required for withholding of removal. See INS v. Stevic, 467 U.S. 407 (1984). The evidence does not establish if either of these respondents has to return to Colombia it's more likely then not that they would be subject to persecution on Account of one of the five grounds specified in section 241 (b) (3) of the Act.

Likewise, the respondents have not shown it's more likely then not that they would be tortured if returned to Colombia.

The respondents have declined to designate a country of removal so pursuant to Section 241(b) (2) of the Act, the Court is designating Colombia if it becomes necessary to remove the respondents from the United States.

In light of the foregoing after considering all the testimony and documentary evidence of record, the following order will be entered:

ORDER

IT IS ORDERED that the application for asylum under Section 208 of the Act, the application for withholding of removal under Section 241(b) (3) of the Act, and the application for treatment under the Convention Against Torture' of Clara Ines Sanchez-Ayala and of James Castro be denied.

IT IS ORDERED that the respondents, Clara Ines Sanchez Ayala and James Castro be removed from the United States to Colombia.

IT IS ORDERED that the respondents, Clara Ines Sanchez Ayala and James Castro be removed from the United States to Colombia.

/S/

September 14, 2004 TEOFILA CHAPA
Immigration Judge

I hereby certify that the attached proceeding before TEOFILA CHAPA, in the matters of:

CLARA INES' SANCHEZ-AYALA
JAMES CASTRO

A 95 264 423
A 95 264 424

Miami, Florida

was held as herejn appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

IMMIGRATION COURT
333 SOUTH MIAMI AVE., STE.700
MIAMI, FL 33130-1904

In the Matter of
Case No.: A95-264-423
SANCHEZ-AYALA, CLARA INES
Respondent
IN REMOVAL PROCEEDINGS
ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Sep 14, 2004. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to Colombia
[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to alternative to
[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $_____.
With an alternate order of removal to
[X] Respondent's application for asylum was ~~( )~~ ~~granted~~ (x) denied ~~( ) withdrawn~~.
[X] Respondent's application for withholding of removal was ~~( ) granted~~ (x) denied ~~( ) withdrawn~~.
[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.
[ ] Respondent's application for cancellation of removal ( ) granted under was ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ____ until)_____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivoless asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[X] Other: CAT-DENIED

Date: Sep 14, 2004

Appeal: Waived/served Appeal Due by:

Respondent October 14 2004

TEODULO CHAPA
Immigration Judge

000071

ALIEN NUMBER: 95-264-[illegible] NAME: SANCHEZ-AYALA, CLARA INES'

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN C/O custodial officer [ ]
ALIEN'S ATT/REP [X] INS
DATE: 14 SEP 2004 BY: COURT STAFF
Xx/_____
Attachments: [ ] EDIR-33 [ ] EDIR-20 [ ] Legal [ ]
Service List [ ] Other

Q6

000072

ALIEN NUMBER: 95-2614124 NAME: CASTRO, JAMES

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN C/O custodial officer [ ]
ALIEN'S ATT/REP [X] INS
DATE: 14 SEP 2004 BY: COURT STAFF
Xx/_____
Attachments: [ ] EDIR-33 [ ] EOIR-20 [ ] Legal [ ]
Service List [ ] Other

Q6

000337

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive office for Immigration Review

Falls Church Virginia 33041

File. A95 264 423 -Miami Date FEB 07 2006
A95 264 424
In re: SANCHEZ-AYALA, CLARA INES
CASTRO, JAMES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Anthony Alvarez, Esquire

ORDER:
PER CURIAM We adopt and affirm the Immigration Judges decision and the appeal will be dismissed with the following additional comments. *Matter of Burbano*, 20 I&N Dec. 872,874 (BIA 1994)(noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those with the [I]mmigration [J]udge articulated in his or her decision"). We agree with the Immigration Judge that the respondents failed to present credible claim for relief. The respondents' story was implausible and inconsistent. *See generally Matter of A-S-*, 31 I&N Dec. 1106 (BIA 1998)(discussing credibility and credibility related issued). The respondents' failed to provide testimony that was believable, consistent, and sufficiently detailed to provide a plausible and coherent

IMMIGRATION COURT
333 SOUTH MIAMI AVE., STE.700
MIAMI, FL 33130-1904

In the Matter of
Case No.: A95-264-424
JAMES CASTRO
Respondent
IN REMOVAL PROCEEDINGS
ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Sep 14, 2004. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to Colombia
[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to alternative to
[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $_____.
With an alternate order of removal to
[X] Respondent's application for asylum was ~~(-) granted~~ (x) denied ~~(-) withdrawn~~.
[X] Respondent's application for withholding of removal was ~~(-) granted~~ (x) denied ~~(-) withdrawn~~.
[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.
[ ] Respondent's application for cancellation of removal ( ) granted under was ( ) granted under section 240A(b)(2) ( )

denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ____ until)_____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivoless asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[X] Other: CAT-DENIED

Date: Sep 14, 2004

Appeal: Waived/served Appeal Due by:

Regarding October 14 2004

000336

account of the basis for their fear *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The lead respondent asserted that her life was threatened by the FARC, and that she was able to flee to the United States, but returned to Colombia to care for her sick mother (Tr. At 45). The respondent stated that after her mother healed, she decided to continue her work with the liberal party, providing literacy programs to farmers, knowing that she would be returning to the zone of danger. The respondent testified that on many occasions while meeting with farmers, she was surprised by the FARC, and barely escaped by literally running out the back door, as the FARC entered the front door (Tr. At 41-42). Finally, we noted that the respondent was able to live unmolested in Colombia while she cared for her mother (Tr. At 46-47). *See Matter of C-A-L-*, 21 I&N Dec. 754 (BIA 1997). Accordingly, the appeal is dismissed.

/S/

FOR THE BOARD

000055

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive office for Immigration Review

Falls Church Virginia 33041

File. A95 264 423 -Miami Date JUN 05 2006
A95 264 424
In re: SANCHEZ-AYALA, CLARA INES
CASTRO, JAMES

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Pro se

ORDER:

PER CURIAM. The respondents move the Board pursuant to 8 C.F.R. § 1003.2 to reopen our decision dated February 7, 2006. We dismissed the respondents' appeal from the Immigration Judge's decision which denied their applications for asylum, withholding of removal, and protection under the Convention Against Torture. The motion will be denied.

We find that the respondents' evidence is not likely to change the result in the case. See Matter of Coelho, 20 I&N Dec. 464 (BIA 1992). The March of 2006 letter from the lead respondent's cousin and the April of 2006 letter from the "male respondent's friend do not present any new facts which are material to their applications for relief and protection from removal. The March of 2006 letter from a medical center to the lead respondent does not contain any new facts.

A December 27, 2001, letter from a doctor at the medical center (Exh. 2) contains essentially the same information. A March 27, 2006, letter from the local president of the Liberal Party does not discuss any threats specific to the respondents. Finally, a September of 2002 letter from a social foundation to the respondents was previously available and could have been presented for the hearing below. See 8 C.F.R.§ I003.2(c)(I).

Accordingly, the motion is denied.

FOR THE BOARD

000002

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-13657-G

CLARA INES SANCHEZ-AYALA,
JAMES CASTRO,

Petitioners,

Versus

U.S. ATTORNEY GENERAL,

Respondent.

On Appeal from the United States District Court for the Southern District of Florida

---

BEFORE: DUBINA, BLACK and PRYOR, Circuit Judges.

BY THE COURT:

Petitioners' motion to stay their removal pending disposition of this petition is DENIED, as Petitioners have failed to meet the "clear and convincing evidence" standard in 8 D.S.C. § 1252(f)(2). See Weng v. Attorney General, 287 F.3d 1335 (11th Cir. 2002) (per curiam). We also note that Petitioners would not satisfy the traditional test for granting injunctive relief. See Dorelien v. U.S. Attorney General,

317 F.3d 1314 (11th Cir. 2003); cf. Kenyeres v. Ashcroft, 538 U.S. 1301,123 S.Ct: 1386, 155 L.Ed.2d 301 (Kennedy, Circuit Justice, March 21, 2003).

Filed U.S. Court of Appeals 11th Circuit JUL 24 2006
Thomas K. Khan Clerk

Supreme Court of the United States Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479.3011

August 28, 2006

Ms. Georgia B. Gillett
The Gillett Law Firm, P.A.
19620 Pines Blvd
Suite 202A
Suite 200-32
Pembroke Pines, FL 33029

Re: Clara I. Sanchez-Ayala et al.
v. Alberto R. Gonzalez, Attorney General
Application No. 06A220

Dear Ms. Gillett:

The Application for a stay of removal in the above-entitled case has been presented to Justice Thomas, who on August 28,2006 denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk.

By /S/

Cindy Rapp
Deputy Clerk

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-13657
Non-Argument Calendar

FILED
U.S COURT OF AAPPEALS
ELEVENTH CIRCUIT
January 22, 2007
THOMAS K. KAHN CLERK

BIA Nos.
A95-264-423 & A95-264-424

CLARA INES SANCHEZ-AYALA, JAMES CASTRO,

Petitioners,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the Board of Immigration Appeals

(January 22, 2007)

Before WILSON, PRYOR and KRA VITCH, Circuit Judges.

Clara Ines Sanchez-Ayala and her husband, James Castro, petition this court for review of the Board of Immigration Appeals's ("BIA") decision denying their motion to reopen the BIA's affirmance of the Immigration Judge's ("IJ") order of removal. Sanchez-Ayala also argues that she established her prima facie eligibility for relief from removal. Because we conclude that we lack jurisdiction to review the merits of the asylum and withholding claims, we dismiss the petition in part. Because the BIA did not abuse its discretion in denying Sanchez-Ayala's motion to reopen, we deny the petition as to the motion to reopen.

1. Background

Sanchez-Ayala and her husband James Castro, Colombian citizens, were admitted to the United States on non-immigrant visas and remained beyond the expiration period. The INS issued notices to appear, charging them with removability. Sanchez-Ayala submitted an application for asylum on behalf of herself and Castro, stating that she sought asylum because she feared persecution from Revolutionary Armed Forces of Colombia ("F ARC") based on her political opinion and membership in the Liberal Party. She further alleged that FARC twice had sent search parties to find her and that relocation was not an option. She later supplemented her application with an article showing that her supervisor had been killed by an unidentified party.

At the removal hearing, Sanchez-Ayala conceded removability and both she and her husband testified to the threats and persecution they allegedly suffered, as a result of Sanchez-Ayala's work with the Social Advance Foundation and her participation in the Liberal Party, and Castro's work with the National Advanced Movement. Sanchez-Ayala testified to threatening phone calls she had received and

warnings to leave the area. Castro testified to similar threats, although he admitted that he had not told his wife about the threats because he did not want to frighten her.

The government submitted the 2001 State Department Country Reports acknowledging FARC's presence throughout the country and its frequent attacks on civilians, teachers, and female political leaders. The IJ concluded that it was unlikely Sanchez-Ayala would have continued her work after receiving threats and that it was unbelievable that Castro would have found the threats serious enough to force him to leave the country and yet not tell his wife about them. Accordingly, the IJ found the testimonies lacked credibility, and that the two were not entitled to relief from removal. Sanchez-Ayala appealed to the BIA, and on February 7, 2006, the BIA dismissed the appeal.

On May 2, 2006, Sanchez-Ayala filed a motion to reopen arguing that she recently received previously unavailable documents from Colombia proving she and Castro would be killed if they returned to Colombia. She attached the following evidence: (1) a April 15, 2006, letter from a friend stating that Colombia remained unstable and it was not safe for them to return because of possible persecution, (2) a March 18, 2006, letter from a psychologist who treated Sanchez Ayala for post-traumatic stress, stating that Sanchez-Ayala should avoid returning to Colombia, (3) a March 16, 2006, letter from Sanchez-Ayala's cousin stating that groups had attacked farmers and invaded a town named Cordoba, (4) a September 2002 certificate detailing Sanchez-Ayala's work with human rights of indigenous communities, and Castro's work to educate people in religious programs, and (5) a letter from the Liberal Party certifying Sanchez-Ayala's and Castro's party membership and advising them to stay out of Colombia because party members were in danger.

The BIA denied Sanchez-Ayala's motion stating that the evidence she submitted was not likely to change the result in her case because the letters dated March 16 and 18 and April 15 did not present any new facts that were material to Sanchez-Ayala's application for relief, and the party letter, which was available at the time of the hearing, did not discuss specific threats. Sanchez-Ayala now petitions this court for review.

II. The Petition for Review

1. Jurisdiction

We review subject matter jurisdiction de novo. Ortega v. Att'y Gen., 416 F.3d 1348, 1350 (11th Cir. 2005). A petition for judicial review of a BIA order must be filed no later than 30 days after the date of the final order of removal. 8 U.S.C. § 1252(b)(1). Time limits for judicial review are mandatory and jurisdictional and are not tolled by the filing of a motion to reopen. Dakane v. *U.S.* Atty. Gen., 399 F.3d 1269, 1272 n. 3 (11th Cir. 2005) (citation omitted).

Sanchez-Ayala's arguments that she was credible and entitled to relief from removal are barred by her failure to file a timely petition for review of those claims. The BIA dismissed her appeal on February 7, 2006, but Sanchez-Ayala did not petition this court for review until June 30, 2006. Thus, this petition for review was untimely as to her claims for relief from removal. 8 *U.S.C.* § 1252(b)(l). Moreover, Sanchez-Ayala's motion to reopen did not toll the time limit for her to file a petition for review of those claims. Dakane, 399 F.3d at 1272 n. 3. Therefore, our review is limited to the June 5, 2006, order denying the motion to reopen.

2. Motion to Reopen

Sanchez-Ayala asks this court to take judicial notice of a 2005 State Department Country Report on Colombia attached to her brief. She asserts that the party letter and Country Report provide evidence of her prima facie eligibility for relief and require that her claims be reopened.

We review the BIA's denial of a motion to reopen for abuse of discretion. Mejia Rodriguez v. Reno, 178 F.3d 1139, 1145 (11th Cir. 1999). Motions to reopen are disfavored in removal proceedings because "as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." INS v. Doherty, 502 U.S. 314, 323,112, S.Ct. 719,116 L.Ed.2d 823 (1992). An applicant seeking to reopen proceedings bears a heavy burden. Al Naijar v. Ashcroft, 257 F.3d 1262, 1302-03 (11th Cir. 2001).

The regulations provide that a motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. 8 C.F.R. § 1003.2(c). The BIA may deny a motion to reopen if: (l) the movant did not establish a prima facie case for the underlying substantive relief; (2) the movant did not introduce previously unavailable material evidence; and (3) the movant, despite being eligible, is not entitled to the discretionary grant of relief. Al Najjar, 257 F.3d at 1302.

The BIA did not abuse its discretion in denying Sanchez-Ayala's motion to reopen. As an initial matter, we cannot consider the 2005 Country Report because it was not previously considered by the BIA. See Ruiz v. U.S. Att'y Gen., 440 F.3d 1247,1255 (11th Cir. 2006) (quotations and

citation omitted). Moreover, in her appellate brief, Sanchez-Ayala only refers to the party letter as evidence in support of her motion to reopen. Thus, she has abandoned all arguments related to the other evidence she presented in her motion to reopen. Sepulveda v. U.S. Att'y Gen., 401 F.3d 1226, 1228 n.2 (11th Cir. 2005).

The letter, however, was dated before the removal hearing and did not present any new information that was unavailable at the time of the hearing. The record contained a copy of the Country Reports indicating FARC's country-wide activities. Moreover, the letter only made references to general threats to members of the Liberal Party and was not specific to Sanchez-Ayala or Castro. Al Najjar, 257 F.3d at 1302.

Finally, even if the letter was considered, it would not compel a conclusion that the IJ erred because it would have no impact on the IJ's adverse credibility determination with respect to the denial of relief from removal. Therefore, Sanchez-Ayala could not establish her prima facie eligibility for relief, and the BIA did not abuse its discretion in denying the motion to reopen.

III. Conclusion

Based on the foregoing, we conclude that we lack jurisdiction to review the merits of the asylum and withholding claims, and DISMISS the petition in part. Because the BIA did not abuse its discretion in denying Sanchez-Ayala's motion to reopen, we DENY the petition as to the motion to reopen.